Supreme Court, U.S.
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No. 02-554

In The
Supreme Court of the United States

JOHN D. ORR, BETTY E. SANFORD, FRANKIE L. MOORE, JIMMIE MARTIN, and NATHANIEL HENLEY,

Petitioners,

v.

AMERICAN HERITAGE LIFE INSURANCE COMPANY, FIRST COLONIAL INSURANCE COMPANY OF FLORIDA, and FIDELITY NATIONAL CORPORATION,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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STATEMENT OF THE CASE

Fidelity takes issue with some of the factual statements made by Petitioners in their Statement of the Case; therefore, Fidelity offers the following statement of the case:

Petitioners are customers of Fidelity who entered into loan transactions and purchased credit related insurance. As part of the consideration for making the loans, each of the Petitioners signed arbitration agreements. Specifically, the arbitration agreements, signed by each of the petitioners, clearly provide that:

> "any claim, dispute or controversy between undersigned . . . and lender (or the employees, agents or assigns of lender) arising from or relating to the loan or any prior extension of credit by lender to any of the undersigned insurance written in connection herewith . . . shall be resolved by binding arbitration."

Despite signing the arbitration agreements, Petitioners filed a civil action in Mississippi state court against Fidelity and three of its individual employees/former employees as well as against First Colonial Insurance Company of Florida and American Heritage Life Insurance Company (collectively, the "Insurers") asserting various causes of action arising from the loans and the sales of insurance.

On March 8, 2001, Fidelity, along with the Insurers, filed these actions seeking orders compelling arbitration and staying the state court action. It was undisputed that each of the Petitioners executed at least one mandatory and binding arbitration agreement in conjunction with the loan transactions. The arbitration agreements preclude

the resolution of Petitioners' claims outside the operation of the Federal Arbitration Act, 9 U.S.C. §1 (the "FAA"). Additionally, it was undisputed that Petitioners' claims against Fidelity and the Employees were predicated upon "the loan or any prior extension of credit" and upon "insurance written in connection" with the extension of credit and/or the loans.

On June 28, 2001, the district court issued opinions and orders compelling arbitration in each of the cases, requiring that Petitioners' claims be submitted to arbitration in accordance with the arbitration agreements, staying all proceedings in the state court suit, and closing the cases. Motions for reconsideration were filed which were denied.

Appeals were taken to the Fifth Circuit. The Fifth Circuit issued an opinion in which it affirmed the district court's orders compelling arbitration and staying the state court proceeding. A petition for rehearing was filed and was denied.

ARGUMENT

There are no compelling reasons that would justify granting a writ of certiorari in this matter. Contrary to the argument of Petitioners, the decision of the Fifth Circuit Court of Appeals is not in conflict with any decision of any other United States court of appeals on the same matter. In addition, the Fifth Circuit did not decide an important federal question in a way that conflicts with a decision by a state court of last resort. Also, in deciding this case, the Fifth Circuit did not depart from the accepted and usual course of judicial proceedings, or sanction such a departure

by the lower court, so as to call for an exercise of this Court's supervisory power. Finally, the Fifth Circuit did not decide an important question of federal law that has not been, but should be, settled by this Court, and the Fifth Circuit did not decide an important question in a way that conflicts with relevant decisions of this Court. See Rule 10 of the Supreme Court Rules. Therefore, none of the considerations under which this Court would consider granting a writ of certiorari exist in this matter.

The reasons argued in the Petitioners' writ application do not justify granting a writ in this matter. The Fifth Circuit was correct in affirming the orders compelling arbitration and staying the state court proceedings. Contrary to the arguments of the Petitioners, the Fifth Circuit did not err in concluding that the Petitioners voluntarily waived their right to a jury trial and that the arbitration agreements are not unenforceable due to alleged high costs of arbitration; the Fifth Circuit's decision does not impair the Mississippi Insurance Commissioner's statutory powers to regulate the business of insurance in Mississippi; the Fifth Circuit's decision is not a contradiction; and the Fifth Circuit's decision does not conflict with decisions of other circuits. This Court should deny this writ application.

I. THE FIFTH CIRCUIT CORRECTLY FOUND THAT THE PETITIONERS VOLUNTARILY WAIVED THEIR RIGHT TO A JURY TRIAL.

The Petitioners voluntarily and knowingly signed the arbitration agreements which contained the following language, which appeared immediately above the signature line:

THE PARTIES UNDERSTAND THAT BY SIGNING THIS ARBITRATION AGREEMENT, THEY ARE LIMITING ANY RIGHT TO PUNITIVE DAMAGES AND GIVING UP THE RIGHT TO A TRIAL IN COURT, BOTH WITH AND WITHOUT A JURY.

The arbitration agreements clearly and unmistakably provided for a waiver of any right to a jury trial. *See Smith v. EquiFirst Corporation*, 117 F. Supp. 2d 557, 560-62 and 564-66 (S.D. Miss. 2000.)

Petitioners contend that since the arbitration agreements effectively waive their right to a jury trial or a bench trial, waive their right to collect punitive damages, and effectively foreclose their right of access to the courts of Mississippi, the Fifth Circuit erred in affirming the orders compelling arbitration. The Petitioners cite to the Mississippi Constitution and several Mississippi cases in support of this argument. However, these do not support their argument. The Mississippi Supreme Court jurisprudence supports the Fifth Circuit's decision.

The strong public policy and presumption in favor of the enforcement of arbitration agreements by the federal courts has been adopted by the Mississippi Supreme Court. In *IP Timberlands Operating Co., Ltd. v. Denmiss Corp.*, 726 So. 2d 96, 104 (Miss. 1998), the Mississippi Supreme Court expressly overruled a line of decisions which had permitted the unilateral revocation of arbitration agreements and stated that it would henceforth "respect the right of an individual or entity to agree in advance of a dispute to arbitration or other alternative dispute resolution." Additionally, the court recognized that:

> "In enacting §2 of the Arbitration Act, *Congress declared a national policy favoring arbitration and withdrew the power of the states to require a judicial forum for the resolution of claims which the contracting parties agreed to resolve by arbitration*. Congress has thus mandated the enforcement of arbitration agreements." *Southland Corp. v. Keating*, 465 U.S. 1, 10, 104 S. Ct. 852, 79 L. Ed. 2d 1 (1984)). The Arbitration Act, resting on Congress's authority under the Commerce Clause, creates a body of federal substantive law that is applicable in both state and federal courts. *Moses H. Cone Memorial Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 103 S. Ct. 927, 74 L. Ed. 2d 765 (1983).

726 So. 2d at 107 (emphasis added).

The Mississippi Supreme Court also stated that: "Doubts as to the availability of arbitration must be resolved in favor of arbitration." 726 So. 2d at 107. Therefore, in accordance with the public policy of the State of Mississippi, "[a]rticles of agreement to arbitrate, and awards thereon are to be liberally construed so as to encourage the settlement of disputes and the prevention of litigation, and every reasonable presumption will be indulged in favor of the validity of arbitration proceedings". *Smith Barney, Inc. v. Henry*, 775 So. 2d 722, 724 (Miss. 2001).

Petitioners argue that, despite the *IP Timberlands* decision, the arbitration agreements should be set aside because they were entered into between parties of unequal bargaining power and unequal knowledge and because they involved boilerplate contracts of adhesion. This argument is not supported by the Mississippi jurisprudence. In *Russell v. Performance Toyota, Inc.*,

No. 2001-CA-00832-SCT (Miss. 9/19/02) 826 So. 2d 719, the Mississippi Supreme Court recently rejected an argument that the arbitration agreement was unilateral and inequitable because the plaintiff who had signed the agreement was a consumer and Performance Toyota was a corporation with a much greater bargaining position. The *Russell* court noted that there were numerous car dealerships in the area where the plaintiff purchased the car and that the defendant was not the sole supplier. It was also noted that after the plaintiff was presented with the purchase agreement, he was not coerced into signing it and could have walked away and could have gone to another dealership. *Id.* Therefore, the court upheld the arbitration agreement even though it was between a consumer and a commercial entity. *See also, Smith Barney, supra.*

The Mississippi Supreme Court in *Russell* has clearly rejected the notion that the *IP Timberlands* reasoning does not apply to a case involving a consumer and a commercial operation. Therefore, the Fifth Circuit did not err in holding that the Petitioners' arbitration agreements were valid and enforceable.

The Petitioners also argue that the Fifth Circuit erred in enforcing the arbitration agreements because they are unconscionable. They rely on the case of *East Ford, Inc. v. Taylor*, 2000-IA-01527-SCT (Miss. 7-18-2002) 826 So. 2d 709. That reliance is in error. Contrary to the Petitioners' claim, the arbitration agreement in the *East Ford* case was not similar to the one in this particular case. Indeed, the main factor on which the Mississippi Supreme Court relied on, in finding unconscionability in *East Ford,* was the fact that the arbitration agreement was not printed in boldface type and the typeface for the arbitration agreement was smaller than all of the other provisions of the

contract. To the contrary, the arbitration agreement in this case is in boldface print and is very clearly marked in the document. Also, the *East Ford* court found that the arbitration clause was clearly one-sided with the proponent of the agreement having the right to unilaterally rescind the entire agreement. The arbitration agreements in this case are not similar to the *East Ford* agreement. Rather, the Petitioners' arbitration agreements clearly provide that any claim, dispute, or controversy between the petitioner and respondent arising from or related to the loan or a prior extension of credit by respondent to the petitioner, etc. shall be resolved by binding arbitration. Therefore, both parties to the agreement agreed to arbitrate claims. The *East Ford* case is clearly distinguishable. *See also*, *Russell*, *supra,* n. 1.

In addition, the more recent Mississippi Supreme Court decision in *Russell*, *supra*, provides further support for the enforcement of the arbitration agreement in this case. In *Russell*, the plaintiff argued that the arbitration agreement was unilateral and unconscionable because he had a lack of knowledge of the contract as a whole and of the arbitration agreement in particular. The Mississippi Supreme Court noted that the arbitration agreement was preceded by boldface and capitalized headings and was almost immediately succeeded by the signature line. The court stated: "In Mississippi, a person is charged with knowing the contents of any document that he executes." 826 So. 2d at 726. Finally, with regard to the plaintiffs' claim that the arbitration clause unnecessarily shielded the defendant from its own potential negligence, the *Russell* court found that the arbitration clause pertained to claims of either party and did not benefit the defendant

only. *Id.* Thus the court rejected the unconscionability claim.

The recent jurisprudence of the Mississippi Supreme Court is not in conflict with the Fifth Circuit decision with regard to enforcement of the arbitration agreements. Rather, the cases support the decision reached by the Fifth Circuit.

II. THE FIFTH CIRCUIT CORRECTLY HELD THAT THE ARBITRATION AGREEMENTS ARE NOT UNENFORCEABLE DUE TO ALLEGED HIGH COSTS OF ARBITRATION.

Petitioners argue that the Fifth Circuit erred in rejecting their claim that the agreements are unenforceable because the Petitioners would have to pay significant costs in order to arbitrate their claims to conclusion. Petitioners failed to meet their burden of proving the likelihood of incurring prohibitively expensive costs. *Green Tree Financial Corp. v. Randolph*, 531 U.S. 79, 92, 121 S. Ct. 513, 522, 148 L. Ed. 2d 373 (2000). The Fifth Circuit did not err in finding that the Petitioners did not satisfy that burden.

First, the provision in the American Arbitration Association ("AAA") administrative fee schedule states that *"[u]nless the parties agree otherwise,* arbitrator compensation and administrative fees are subject to allocation by the arbitrator in the award." (Emphasis added). In this case, the arbitration agreements provide that "the party requesting arbitration shall at that time pay the arbitrator $125.00. Lender shall pay arbitrator all other arbitration fees and expense costs for up to one day

(eight hours) of proceedings. Any other such costs shall be paid by the nonprevailing party. . . . "

Based on that language, since the filing fee and case service fee are necessary "for up to one day (eight hours) of proceedings," the filing fee and case service fee are payable by Fidelity, and any others claiming the benefit of the arbitration agreements through Fidelity, and are clearly not payable by the Petitioners. If, and to the extent the arbitration hearing may go beyond one day, Fidelity has represented that it will pay all of the costs and expenses of arbitration, if the Petitioners prevail. Therefore, the Fifth Circuit correctly found that the record does not support the conclusion that it is likely that the Petitioners will have to pay prohibitively expensive costs in order to arbitrate their claims.

Finally, Rule R-51 of the Commercial Arbitration Rules of the AAA provides, in part, that "[t]he AAA may, in the event of extreme hardship on the part of any party, defer or reduce the administrative fees." To date, Petitioners have not inquired or sought clarification about this issue and they have not sought any deferral or reduction of the administrative fees, if any, that might be payable by the Petitioners with respect to their claims against Respondent. Having *not* done so, the Petitioners have not and can not prove, that it is probable that the petitioners will have to pay prohibitively expensive costs in order to arbitrate their claim to conclusion. *See Dobbins v. Hawks' Enterprises,* 198 F. 3d 715 (8th Cir. 1999) (holding that plaintiff's failure to explore the AAA fee waiver provisions prevented the trial court from ruling on the plaintiff's contention that the arbitration clause was unconscionable because of fees).

The cases cited by Petitioners in support of their argument regarding the costs of arbitration, *Shankle v. B-G Maintenance Management of Colorado, Inc.,* 163 F. 3d 1230, 1234-35 (10th Cir. 1999) and *Cole v. Burns International Security Services,* 105 F. 3d 1465, 1483-89 (D. C. Cir. 1997), do not support their position. In *Shankle,* the appellate court followed *Cole.* In *Cole,* the court based its decision with regard to the fees and costs of arbitration upon its finding or conclusion that the arbitration agreement did not expressly address who would pay the arbitrator's fees and that there was no indication in the rules of the AAA that an arbitrator's fees could be reduced or waived in cases of hardship. *Id.*

As the Fifth Circuit noted, the present scenario is distinguishable from *Cole* and *Shankle*, because the arbitration agreements signed by the Petitioners provide that "[t]he party requesting arbitration [Fidelity] shall at that time pay the arbitrator $125.00. Lender [Fidelity] shall pay all other arbitration fees and expenses and costs for up to one day (eight hours) of proceedings. Any other such costs shall be paid by the non-prevailing party." Furthermore, as pointed out above and as the Fifth Circuit found, the rules of the AAA provide "sufficient avenues to request fee-paying relief, if necessary". Thus, the *Cole* and *Shankle* decisions are distinguishable in relation to this action to compel arbitration of the Petitioners' claims against Fidelity.

Indeed, other jurisprudence supports the Fifth Circuit's decision. In *Arakawa v. Japan Network Group,* 56 F. Supp. 2d 349 (S.D. N.Y. 1999), the court declined to follow *Shankle* and *Cole,* and determined that the possibility that a plaintiff might be required to pay a portion of arbitration costs did not preclude the arbitration of her

Title VII claims. *Id* at 355. The court held that the possibility that a plaintiff may be required to pay arbitration fees is not, by itself, a sufficient reason to invalidate an agreement to arbitrate Title VII claims at the outset because the arbitral panel may not, in fact, require the plaintiff to pay fees, and, if a plaintiff believes that excessive fees have been levied against him or her, judicial review of the imposition of the fees is available after arbitration. *Id.*

In *Rosenberg v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 170 F. 3d 1 (1st Cir. 1999), the court recognized the availability of judicial relief should the costs be excessive. In *Rosenberg*, an employee argued that the arbitration agreement was unconscionable because the employee could be charged forum fees, which might be as high as $3,000 per day and tens of thousands of dollars per case. *Id* at 15. The court responded that if unreasonable fees were to be imposed on an employee, the employee could present the issue to the reviewing court. *Id* at 16. The court noted that "[c]ontrary to Rosenberg's arguments, arbitration is often far more affordable to plaintiffs and defendants alike than is pursuing a claim in court." *Id.*

Additionally, in *Sydnor v. Conseco Financial Servicing Corp.*, 252 F. 3d 302 (4th Cir. 2001), the Court held that the financing contract's arbitration provision was not unconscionable due to unknown fees, costs and procedures and that the plaintiff had presented little evidence from which the District Court could have concluded that arbitration was prohibitively expensive and, furthermore, the financing company had represented to the Court its willingness to pay the arbitration fees arising from the dispute. *Id* at 306.

Petitioners' contention regarding costs is simply without merit. The cost of the arbitration proceedings is not a basis to preclude enforcement of the agreements and this argument does not warrant the granting of writs of certiorari in this matter.

III. THE FIFTH CIRCUIT CORRECTLY FOUND THAT THE AMERICAN ARBITRATION ACT IS NOT REVERSE PRE-EMPTED BY ANY STATE STATUTE.

The Petitioners have argued that the writ should be granted because the Fifth Circuit's decision effectively eviscerates the Mississippi Insurance Commissioner's statutory given power to regulate the business of insurance in Mississippi. Relying on the McCarran-Ferguson Act, 15 U.S.C.A. §1012, the Petitioners argue that the FAA is precluded or preempted by state law.

The McCarran-Ferguson Act does not affect the enforceability of the arbitration agreements with regard to the Petitioners' claims against Fidelity. It is assumed that Petitioners intend for this argument to apply only to the claims against the Insurers and not to the claims against Fidelity. However, out of an abundance of caution, Fidelity will briefly address the issue.

As the Fifth Circuit found, the Petitioners failed to demonstrate that there is a Mississippi statute regulating the business of insurance which prohibits arbitration or arbitration agreements with respect to credit insurance and claims, disputes, and controversies related to credit insurance. The McCarran-Ferguson Act is operative, if at all, only in the context of a state statute. *See Miller v. National Fidelity Life Insurance Company,* 588 F. 2d 185

(5th Cir. 1979). The Tenth and the Second Circuits have held that the McCarran-Ferguson Act does not bar application of the FAA to insurance contracts. *Hart v. Orion Ins. Co.*, 453 F. 2d 1358, 1360 (10th Cir. 1971); *Hamilton Life Ins. Co. of N. Y. v. Republic Nat. Life Ins. Co.*, 408 F. 2d 606, 611 (2d Cir. 1969). The basis of their decisions, like that of the district court and the Fifth Circuit in this matter, was that the party seeking to avail itself of McCarran-Ferguson Act failed to show that application of the FAA would invalidate, impair, or supersede any particular state law which regulated the business of insurance.

Petitioners argue that they have put forward Title 83 of the Mississippi Code of 1972 and in particular, §83-53-15, as evidence of the applicability of the McCarran-Ferguson Act. However, a close reading of these statutes and in particular §83-53-15, does not reveal any specific authority for the Commissioner to prohibit arbitration agreements such as the ones at issue in this case from being enforceable. Furthermore, it should be noted that the arbitration agreements at issue here are not found in any policy of insurance. Rather, they are separate documents that were executed by the Petitioners in conjunction with their execution of several other documents related to loans that they obtained from Fidelity. Indeed, the arbitration agreements do not specifically refer to the Insurers and the Insurers did not execute the arbitration agreements. The Insurers are simply third party beneficiaries of the arbitration agreements.

Additionally, there is no statutory or other requirement that the arbitration agreements between the lender Fidelity and the Petitioners be filed with and approved by the Commissioner or the Department of Insurance. While

there are certain statutes which require insurance companies to file and obtain the Commissioner's approval of application, policy, certificate, endorsement and rider forms, the arbitration agreements were not prepared by, nor obtained by, any insurance company, and no insurance company is a named party to the subject arbitration agreements. The arbitration agreements also are not forms, endorsements or riders of or to any policies or certificates of insurance. The arbitration agreements were prepared by Fidelity, a lender of money, and they were entered into by the parties as a part of, and in regard to, transactions in which Fidelity loaned money to the Petitioners, which transactions included credit insurance in connection with the loans. As stated in the arbitration agreements, they were entered into "in consideration of" Fidelity making a loan or otherwise extending credit to the Petitioners.

There is no reverse preemption in this case. Therefore, this is no basis for granting a writ in this matter.

IV. THE FIFTH CIRCUIT'S OPINION IS NOT A CONTRADICTION.

The Petitioner's argument regarding an alleged contradiction in the Fifth Circuit opinion is irrelevant to this Court's decision of whether this petition for a writ should be granted. They argue that, in one place in the opinion, the Fifth Circuit held that because there was no Mississippi statute that addresses arbitration of credit insurance related claims, disputes or controversies, the Mississippi Commissioner of Insurance is without regulatory authority to prohibit arbitration clauses relating to insurance. They also claim that despite that holding, in

another place in the opinion, in a footnote, the Fifth Circuit stated that "the record indicates that the Commissioner can permit or disallow insurance disputes to be subject to arbitration as the Commissioner deems fit."

Those two statements must be analyzed in the context in which they were used. First, the issue before the Fifth Circuit was whether the McCarran-Ferguson Act had been violated by the district court's order compelling arbitration. More particularly, the issue was whether the McCarran-Ferguson Act barred application of the FAA to the arbitration agreements at issue. The Fifth Circuit correctly stated that in order for the McCarran-Ferguson Act to reverse preempt the FAA, there must be a demonstration that application of the FAA would invalidate, impair, or supersede a particular state law that regulates the business of insurance. Finding that the Petitioners had failed to identify any state statute that would be impaired, invalidated, or superseded by the application of the FAA, the Fifth Circuit affirmed the lower court.

The statement made by the Fifth Circuit in the footnote, with regard to the record indicating that the Mississippi Commissioner of Insurance had the ability to permit or disallow insurance disputes to be subject to arbitration as the Commissioner deems fit, has no relation to the issue of whether, under the McCarran-Ferguson Act, a state law reverse preempts the application of the FAA to the arbitration agreements. That issue depends on the existence or non-existence of a **state statute** granting the Mississippi Commissioner of Insurance the authority to disallow the use of arbitration agreements with regard to the sale of credit related insurance. That issue does not depend on whether the evidence reveals that the Mississippi Commissioner of Insurance has either allowed or

disallowed the use of any such agreements. Absent a state statute authorizing that power, there is no state statute that can preempt the FAA under the McCarran-Ferguson Act. Therefore, this is a non-issue and is no basis for granting a writ.

V. THE DECISION OF THE FIFTH CIRCUIT COURT OF APPEALS DOES NOT CONFLICT WITH DECISIONS OF OTHER CIRCUITS.

Petitioners cite three cases which they contend are in conflict with the Fifth Circuit's decision. None of these cases is in conflict with the Fifth Circuit decision.

The first case cited by Petitioners is *Doe v. Norwest Bank Minnesota, N.A.*, 107 F. 3d 1297 (8th Cir. 1997). That case is distinguishable from the present case. In *Doe*, the court addressed the issue of whether the McCarran-Ferguson Act was implicated by the federal RICO statute when it substantially paralleled state law. Although the remedies under RICO were different than the remedies available under the state law, the court held that "the extraordinary remedies of RICO would frustrate, and perhaps supplant, Minnesota's carefully developed scheme of regulation." *Id* at 1308. In this particular case, there is no parallel state statute that addresses arbitration agreements. Therefore, the *Doe* case is not in conflict with the Fifth Circuit's decision.

Next, contrary to the Petitioners' contention, the court in *Grimes v. Crown Life Ins. Co.*, 857 F. 2d 699 (10th Cir. 1988), *cert. denied*, 489 U.S. 1096, 109 S.Ct. 1568, 103 L. Ed. 2d 934 (1989) did not address the issue of whether a state statute preempted the FAA under the McCarran-Ferguson Act. Rather, the issue in *Grimes* was whether

the federal court should abstain from exercising jurisdiction over a case involving a state insurance receivership. The court referred to the McCarran-Ferguson Act as support for the proposition that the act encourages the states to formulate their own systems to regulate insurers doing business in their states. The court recognized that:

> [G]iven the traditional federal deference provided to state receivership proceedings ... coupled with complex and comprehensive procedures adopted for the liquidation of insolvent insurers pursuant to the provisions of the McCarran-Ferguson Act, most federal courts have declined to exercise jurisdiction in disputes like this one which present themselves in the larger context of state liquidation proceedings.

Id. at 703-704. The court held that since Oklahoma had not only adopted the comprehensive scheme to oversee the liquidation of insolvent insurers but had also provided a particular court to oversee the liquidation proceedings, the federal court should have abstained.

The issue in the present case is not an abstention issue. Rather, the issue is whether there is a state law regulating the business of insurance which prohibits arbitration agreements such as the ones in this matter that would be invalidated, impaired or superseded by the FAA. The facts in *Grimes*, the relevant law, and the holding have nothing in common with the present case other than the fact that the McCarran-Ferguson Act is mentioned in both cases. There is nothing in the Fifth Circuit opinion that is in conflict with the *Grimes* decision.

The district court decision in *Schwartz v. Com. Land Title Ins. Co.*, 374 F.Supp. 564 (E.D. Pa. 1974) order supplemented, 384 F.Supp. 302 is likewise distinguishable.

Schwartz addressed the issue of whether a seller charge for title insurance that was imposed on all real estate transactions fell within the exemption from the federal antitrust laws found in the McCarran-Ferguson Act. Under that section of the act, there is a specific provision which states that the Sherman Act, the Clayton Act, and the FTC Act shall be applicable to the business of insurance to the extent that such business is not regulated by state law. The present case does not involve an antitrust claim. Therefore, to the extent the district court decision in *Schwartz* may conflict with the Fifth Circuit decision, it is distinguishable on that basis. In addition, the *Schwartz* court found that the statutory scheme for title insurance regulation was comprehensive and conferred plenary regulatory power on the state Insurance Department including the power to regulate the seller charge. In this case, the petitioners have failed to point to any state statute that would indicate that the Insurance Commissioner had the power to disallow arbitration agreements related to credit life insurance transactions. Therefore, the *Schwartz* case is distinguishable on that basis also.

Each of the decisions cited by Petitioners is distinguishable from the Fifth Circuit decision. Therefore, there is no conflict among the circuits that would warrant the granting of this writ application.

CONCLUSION

There are no compelling reasons that would justify granting a writ of certiorari in this matter. None of the reasons listed in Supreme Court Rule 10 exists in this matter. First, the decision of the Fifth Circuit Court of

Appeals is not in conflict with any decision of any other United States court of appeals on the same matter. Second, the Fifth Circuit did not decide an important federal question in a way that conflicts with a decision by a state court of last resort. Third, in deciding this case, the Fifth Circuit did not depart from the accepted and usual course of judicial proceedings, or sanction such a departure by the lower court, so as to call for an exercise of this Court's supervisory power. Finally, the Fifth Circuit did not decide an important question of federal law that has not been, but should be, settled by this Court, and the Fifth Circuit did not decide an important question in a way that conflicts with relevant decisions of this Court.

In addition, none of the arguments raised by Petitioners would justify the granting of a writ of certiorari in this matter. The Fifth Circuit correctly held that the Petitioners' claims against Fidelity are subject to the arbitration agreements at issue. The Fifth Circuit was correct in affirming the orders compelling arbitration and staying the state court proceedings. Contrary to the arguments of the Petitioners, the Fifth Circuit did not err in concluding that the Petitioners voluntarily waived their right to a jury trial and in concluding that the arbitration agreements are not unenforceable due to alleged high costs of arbitration. The Fifth Circuit's decision also does not impair the Mississippi Insurance Commissioner's statutory powers to regulate the business of insurance in Mississippi. Finally, the Fifth Circuit's decision is not a contradiction and is not in conflict with other circuits. The arbitration agreements, which were executed by the Petitioners in consideration for extensions of loans, explicitly preclude the resolution of the Petitioners' claims outside the operation of the FAA, and the promulgated

commercial arbitration rules of the AAA. This Court should deny this writ application.

Respectfully submitted,

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